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COMMENTARY

THE NEW COPYRIGHT ACT AND THE CLASSROOM USE OF VIDEOTAPED FILMS

FRANCIS M. NEVINS, JR.*

Imagine the difficulties of a literature teacher trying to prepare an article or lecture on Faulkner if copies of his novels were unavailable for purchase and could be read only in libraries. The professor would have to consult the books at a place distant from his office and then attempt to remember the essence of *The Sound and the Fury* or *Hamlet*. Imagine the difficulties of a law professor if court decisions were unobtainable for close examination and could be read only in the courthouse, requiring the professor to keep in his memory the holding and implications of *Miranda v. Arizona*,¹ *Erie Railroad v. Tompkins*,² and numerous other decisions.

These hypotheticals almost mirror reality for those who teach, write, and study in the field of film. Prints of most films are rarely available for purchase, and the kind of intense study that is taken for granted by literature teachers is impossible without the access that only private ownership of a copy affords. As Daniel Moews recently wrote: "[I]n talking about films, it is very difficult not to tell lies. Since they are not apt to be generally available for ready reference, they are, in fact, almost nondiscussable. Too often, one is instead talking about one's fallible memory of them"³

One avenue of relief from this situation has opened during the past several years as an increasing number of film buffs have become hobbyist collectors, purchasing, for private screening and study, sixteen millimeter prints of a wide variety of films from a wide variety of

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1. 384 U.S. 436 (1966).

2. 304 U.S. 64 (1938).

3. D. MOEWS, KEATON 44 (1977).

sources with variable legal consequences.⁴ Recent technological developments have created a new and less expensive option for the student of film; he now can use a home videotape recorder to record movies as they are broadcast by his local television stations, and thus, in time, accumulate a private film library.

The mass marketing of the Sony Betamax and similar hardware from other manufacturers has liberated viewers from their former dependence on the whimsical film scheduling of local stations, and has freed film teachers from being at the mercy of the current catalogues of authorized non-theatrical film distributors. One who believes Hitchcock's *Psycho* is a classic worthy of repeated viewing and study can tape it from the television screen, shutting the recorder off during the commercials, and replay it whenever he wishes. One can join groups such as the Video Club of America, which 20th Century-Fox licenses to sell videotaped copies of fifty Fox films,⁵ or one of the smaller and more informal tape-swap groups.⁶ It is even possible to use videotaped movies for commercial purposes, like the Texas entrepreneurs who are reportedly doing a thriving business providing unauthorized videotape entertainment for the crews of oil tankers and off-shore drilling rigs.⁷

These film cans are matters of physical capacity, not legal right. *Universal City Studios, Inc. v. Sony Corp. of America*,⁸ now scheduled for trial early in 1979, raises among many other issues the question whether noncommercial home videotaping constitutes copyright infringement. Universal and Walt Disney Studios brought suit against Sony, various retailers of the Betamax recorder, and one luckless soul who apparently did nothing but purchase a Betamax for home use.⁹ The plaintiffs sought injunctions against the manufacture, advertising, and sale of the Betamax hardware and its blank tape cassettes, and a declaratory judgment claiming that even the nonprofit private use of

4. See Nevins, *Copyright, Property and the Film Collector*, 29 *RUTGERS L. REV.* 2 (1975).

5. See Murphy, *Fox Pix into Home Tape Market*, *VARIETY*, Aug. 8, 1977, at 1.

6. There is already at least one publication, *The Videophile's Newsletter*, which serves as a channel of communication and marketplace for home videotape hobbyists. The plaintiffs in *Universal City Studios, Inc. v. Sony Corp. of America*, No. 76-3520-F (C.D. Cal., filed Nov. 11, 1976), discussed in notes 8-19 *infra* and accompanying text, have taken the deposition of *Videophile's* editor and are seeking to make him respond to sweeping interrogatories about his subscribers. For excerpts of the deposition, see *The Videophile's Newsletter*, Mar.-Apr. 1977, at 1-7.

7. See *Picture Piracy Proves Profitable Pastime*, *BOXOFFICE*, Oct. 17, 1977, at 1 (s.w. ed.).

8. No. 76-3520-F (C.D. Cal., filed Nov. 11, 1976).

9. Sony alleged that the consumer defendant is actually friendly to and in collusion with plaintiffs. See Defendants' Preliminary Memorandum of Law at 65-66, *Universal City Studios, Inc. v. Sony Corp. of America*, No. 76-3520-F (C.D. Cal., filed Nov. 11, 1976).

such equipment is illegal. Some of the defenses Sony raised in answering the pleadings are: (1) home videotape recording constitutes "fair use;"¹⁰ (2) the consumers' right to make home recordings of material transmitted over the public airwaves is protected by the first amendment; and (3) the right of Sony and the retailers to sell Betamax is a valuable property right, the abridgment of which via the Copyright Act would violate the first and fifth amendments.¹¹

There are several reasons why it is more likely that Sony will prevail. First, as a matter of legal philosophy, the proper function of copyright has always been the regulation of relations among the creator and all those business people who intervene between the creator and the ultimate consumer of intellectual property. Copyright law was never intended to subject the consumer to liability for infringement. Second, as a matter of judicial policy, courts are not and should not be in the habit of turning back the technological clock by declaring particular inventions illegal.¹² Third, the closest judicial precedent, *Williams & Wilkins Co. v. United States*,¹³ suggests that private duplication of copyrighted matter is permitted broad scope under the privilege of fair use.¹⁴ Fourth, Congress' view that home audiotaping of sound recordings for private use and with no purpose of reproducing or otherwise commercially capitalizing is exempt from copyright liability, expressed in the legislative history of the Sound Recording Amendment of

10. 17 U.S.C. § 107 (1976). See notes 22-24 *infra* and accompanying text. For an extensive discussion of the "fair use" defense, see M. NIMMER, NIMMER ON COPYRIGHT § 13.05 (1978).

11. Defendant's Answers at 10-12, *Universal City Studios, Inc. v. Sony Corp. of America*, No. 76-3520-F (C.D. Cal., filed Nov. 11, 1976).

12. The purpose behind Congress' ability to grant copyright protection is "[to] promote the Progress of Science and useful Arts," U.S. CONST. art. I, § 8, cl. 8. See also *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

13. 387 F.2d 1345 (Ct. Cl. 1973), *aff'd per curiam by equally divided Court*, 420 U.S. 376 (1975).

14. A federal district court recently distinguished *Williams & Wilkins* and held at the preliminary injunction stage that § 107 of the Copyright Revision Act, 17 U.S.C. § 107 (1976), does not authorize systematic videotaping of televised, copyrighted educational films in their entirety for noncommercial public school use. *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1978). *Williams & Wilkins* was distinguished on the ground that single articles in the plaintiffs' medical journals were copied, not an entire copyrighted film. Accordingly, the potential harm to plaintiff's market was deemed much greater in *Encyclopaedia* because the reproduction is interchangeable with the original. *Id.* at 251. The *Encyclopaedia* court additionally observed that "[t]his case does not involve an isolated instance of a teacher copying copyrighted material for classroom use but concerns a highly organized and systematic program for reproducing videotapes on a massive scale." *Id.* at 252. The court's emphasis on the scope of the distribution would seem significant in efforts to distinguish *Encyclopaedia* from the situation envisaged in

1971,¹⁵ seems to apply by analogy to the practice of home videotape recording. Fifth, the few relevant dicta in unrelated cases support the position that nonprofit duplication is not within the ambit of the copyright laws.¹⁶ Finally, as the Register of Copyrights has pointed out,¹⁷ there is the consideration that enforcement of a rule proscribing private videotaping would be impossible short of an Orwellian surveillance system.

The *Betamax* case, filed in 1976, is governed by the now superseded Copyright Act of 1909.¹⁸ There is, however, a connection between the resolution of the key issue in that case and an interpretation problem apparent in the Copyright Revision Act of 1976.¹⁹ Suppose a film teacher offers a course on John Ford, but his budget does not permit the rental of all of Ford's major movies. When Ford's 1956 masterpiece *The Searchers* is shown on television, the teacher either videotapes it at home or requests the school's media center to tape the film. If he later plays this videotape for his class, what are the legal consequences under the Copyright Act?

Section 106 of the Act²⁰ lists the exclusive rights granted to a copyright holder. Among these is the right "to reproduce the copyrighted work in copies . . ."²¹ Section 107, however, qualifies this exclusive right, providing that "the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom

15. H.R. REP. NO. 92-487, 92d Cong., 1st Sess. 7 (1971).

16. "[A] court presumably would exercise its discretion . . . not to grant relief against persons whose infringement lay only in photographing the statue for their own pleasure, if, as is hardly likely, the plaintiffs should ever seek this." *Scherr v. Universal Match Corp.*, 417 F.2d 497, 503 (2d Cir. 1969) (Friendly, J., dissenting). "[T]o encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of control over the sale or *commercial* use of copies of their works." *Goldstein v. California*, 412 U.S. 546, 555 (1973) (emphasis added).

17. "I have spoken at a couple of seminars on video cassettes lately, and this question is usually asked: 'What about the home recorders?' The answer I have given and will give again is that this is something you cannot control. You simply cannot control it." *Prohibiting Piracy of Sound Recordings: Hearings on S. 646 and H.R. 6927 Before Subcomm. No. 3 of the House Committee on the Judiciary*, 92d Cong., 1st Sess. 22 (1971) (statement of then Assistant Register of Copyrights Barbara Ringer).

18. Ch. 320, §§ 1-63, 35 Stat. 1075 (1909) (codified as Act of July 30, 1947, ch. 391, §§ 1-215, 61 Stat. 652, 17 U.S.C. §§ 1-215 (1952)).

19. 17 U.S.C. §§ 101-18 (1976).

20. *Id.* § 106.

21. *Id.* § 106(1).

use), scholarship, or research, is not an infringement of copyright.”²² This section also lists the criteria a court should consider in determining whether a particular use is fair. These factors include, but presumably are not limited to:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.²³

If these were the only relevant criteria, it would be uncertain whether the classroom use of the videotaped copy of *The Searchers* was fair or foul. Much would depend on the weight the court accorded to the nonprofit educational character of the use, and on the court's interpretation of the ambiguous fourth criterion.²⁴ But the analysis cannot cease with section 107 because in addition to fair use the new Copyright Act creates a series of blanket exemptions from liability in some situations. If a use falls within an exemption, the fair use criteria are irrelevant.

From the viewpoint of the John Ford teacher, the crucial exemption is contained in section 110(1), which provides that copyright is not infringed by the “performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction”²⁵ Considering the above language in isolation, one might conclude that the film teacher's classroom use of the videotape of *The Searchers* is exempt. The next few lines of the subsection, however, belie this outcome: The statute carves out an exception to the exemption “in the case of a motion picture or other audiovisual work, [where] the performance . . . is given by means of a copy that was not lawfully made under this title, and that the person responsible for the

22. *Id.* § 107.

23. *Id.*

24. The fourth criterion instructs the court to consider only the effect of the particular use complained of upon the market for or value of the work. The Report of the Senate Judiciary Committee, in discussing this language, suggests, however, that the court should universalize the maxim (to use Kantian terminology) and consider what would happen if everyone made such use of the work. “Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented.” S. REP. NO. 94-473, 94th Cong., 1st Sess. 65 (1975).

25. 17 U.S.C. § 110(1) (1976).

performance knew or had reason to believe [the copy] was not lawfully made."²⁶ The test of whether the exemption or the exception applies (prescinding from the scienter element which creates puzzles all its own) is whether the copy was "lawfully made"—a formulation which gives rise to an intriguing difficulty. If the film teacher originally taped *The Searchers* because he was a Ford buff, and only later decided to use the cassette in class, was the tape lawfully made? Assuming Sony's position in the *Betamax* case will be sustained, the answer is yes because the statutory language focuses on the act of making the tape and its lawfulness at the time it was made. If the teacher taped the film with the specific intent to use the tape in class, does the difference in subjective intent convert an otherwise lawful home-use videotape into an unlawfully made copy?²⁷

Another difficulty stems from the allocation of the burden of proof on the "lawfully made" issue. May a copyright holder assert a presumption that all videotapes of movies are unlawful unless proven otherwise, thereby placing the burden of establishing lawful making on the teacher or school?²⁸ May the defendant simply assert that he was motivated by home-study intent when he made the tape and that its classroom use was an afterthought, thereby placing on the plaintiff the burden of rebutting the defendant's statement of subjective intent? And however the evidentiary problem is resolved, what is the significance of the fact that only copies unlawfully made "under this title" fall within the exception to the exemption? Did Congress intend the exemption to apply to all videotaped copies made prior to the effective date of the new act? The House and Senate reports do not aid in the resolution of these puzzles.²⁹

Even if all the issues herein raised were decided against the teacher or institution using the videotape, it must be remembered that the sole consequence would be that the section 110 exemption would not be

26. *Id.*

27. See *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 447 F. Supp. 243, 252 (W.D.N.Y. 1978), which held at the preliminary injunction stage that § 107 of the Copyright Revision Act does not authorize systematic videotaping of televised, copyrighted educational films in their entirety for noncommercial public school use.

28. *American Int'l Pictures, Inc. v. Foreman*, 576 F.2d 661, 665 (5th Cir. 1978), suggests by analogy that film copyright holders may use such a presumption. "Rather, because copyright law favors the rights of the copyright holder, the person claiming authority to copy or vend generally must show that his authority to do so flows from the copyright holder." *Id.* See generally *Nevins*, *supra* note 4.

29. H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 82 (1976); S. REP. NO. 94-473, 94th Cong., 1st Sess. 74 (1975).
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available as a defense. Defendants, however, might still rely on the general fair use provisions of section 107 and argue that it protects the use of videotaped films in a classroom setting. As stated above, it is unclear how a court should rule on the fair use doctrine alone.³⁰

Although the new Copyright Act has resolved many of the difficulties that plagued creators and lawyers under the 1909 statute, it has created numerous fresh puzzles that only time and the courts will unravel. Undoubtedly, suits will be brought under the new Act raising squarely the issue of videotaping for classroom use. The future of film study in our schools depends upon the outcome.

30. See text accompanying notes 22-24 *supra*.

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